In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA, PETITIONER

v.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO, AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

The Solicitor General, on behalf of the United States, petitions that a writ of certiorari be granted to review the judgment of the Supreme Court of the State of Colorado entered in this case on July 9, 1970.

OPINION BELOW

The Colorado Supreme Court did not render any opinion. The opinion and order of the Water Court (App. B, *infra*, pp. 10-13) are not reported.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on July 9, 1970 (App. C, *infra*, p. 14).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether in 43 U.S.C. 666 Congress consented to suits against the United States in state courts for adjudication of its reserved water rights not predicated on state law.

2. Whether the congressional consent to suit in 43 U.S.C. 666 extends to monthly proceedings affecting federal water rights in which a water referee determines, without a formal hearing, water rights of those parties who have voluntarily filed water right applications during the proceeding month.

STATUTE INVOLVED

The Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, provides in pertinent part:

> Suits for adjudication of water rights.
>
> (a) Joinder of United States as defendant; costs.
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are

inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

STATEMENT

On February 11, 1970, the Attorney General received a notice, pursuant to the Colorado Water Right Determination and Administration Act of 1969, Colo. Rev. Stat., 148-21-1 *et seq.*, directed to "all persons interested in water applications in said water division No. 5," that "the following is a resume of all applications filed in the office of the water clerk during the month of December, 1969" (App. A, *infra*, p. 9). There followed a list of water right applications giving brief descriptions of the water use. The notice concluded with the statement that "[y]ou are further notified that you have until the last day of March, 1970, to file a verified statement of opposition to any such application, if you desire to oppose any such applications." Similar notices have been received listing water right applications filed during each month thereafter. In addition, the Attorney General received similar resumes of applications filed in Water Divisions 4 and 6 during the month of December 1969.

In response to the December 1969 notice, the United States filed with the Water Court of Water Division 5 a motion to quash service on the grounds, *inter alia*,

that the proceedings before the water court did not constitute the type of water rights adjudication with respect to which the United States had consented to be sued under 43 U.S. 666. The water court denied the government's motion (App. B, *infra*, pp. 10-13). It recognized that the consent issue is presently before this Court in *United States* v. *The District Court in and for the County of Eagle and the State of Colorado*, No. 87, this Term, certiorari granted, 397 U.S. 1005, a case arising from an earlier Colorado water rights proceeding involving a portion of the same water rights here involved. The court was of the view that it was bound by the decision of the Colorado Supreme Court in *Eagle County* unless and until that decision was overturned by this Court (App. B, *infra*, pp. 12-13). Subsequently, the government's request to extend the time within which to file an answer pending the resolution of *Eagle County* was also denied. Finally, the government applied to the Colorado Supreme Court for a writ of prohibition to stay the proceedings, which the latter court denied on July 9, 1970 (App. C, *infra*, p. 14).

In *Eagle County*, the United States was joined as a defendant to a supplemental water adjudication proceeding for Water District 37, one of the then 70 water districts in Colorado. Subsequent to the Colorado district court's denial of the government's motion to dismiss that action for lack of jurisdiction, the Colorado Water Right Determination and Administration Act of 1969 was passed, abolishing[1] the 70 water districts and replacing them with seven water

[1] But see Section 148-21-44 of the 1969 Act as to pending matters.

divisions. Water Division No. 5 includes the area drained by the Colorado River and its tributaries (excluding the Gunnison River), which also includes the former Water District 37 involved in the *Eagle County* case.

The water rights of the United States within the expanded area, however, are vastly more numerous than those involved in the *Eagle County* case. The Forest Service administers four separate national forests in the area: the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre. The Department of the Interior, through the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries and Wildlife, make use of water in Water Division No. 5 for national recreational and other purposes. The Department of the Navy administers certain Naval Petroleum and Oil Reserves which, if ever developed, would require water to accomplish the federal purpose for which the reservation was made.

As in the former Water District 37, the United States claims two types of rights in the larger Water Division No. 5: *appropriative* rights acquired pursuant to state law, and *reserved* and other rights based on federal law, resulting principally from withdrawals of land from the public domain.

REASONS FOR GRANTING THE WRIT

This case raises in a somewhat different factual context the same issues involved in *Eagle County*, No. 87, this Term. The statutory water adjudica-

tion procedures underlying the decision below, however, are the ones now prevailing in Colorado and will govern future state proceedings affecting the vast water interests of the United States in that state. Because the new procedures are significantly different from the repealed procedures from which *Eagle County* arose, this case complements *Eagle County* in an important way and should also be reviewed by this Court.

Two issues are presented in *Eagle County*. The first is whether the consent to be sued embodied in 43 U.S.C. 666 extends to suits against the United States for adjudication of its reserved water rights not predicated on state law; the second is whether a supplemental water adjudication proceeding under the old state law is the type of general water rights adjudication suit contemplated by the consent statute. The first issue is as squarely presented in this case as in *Eagle County* and needs no elaboration here. See our brief in *Eagle County*, pp. 10-19.

The second issue in *Eagle County* is here presented in the context of the new state procedures. While some of the defects of the old law have been eliminated (*e.g.*, each of the 70 districts under the old law encompassed only a small segment of a river system), the new procedures are, if anything, more burdensome on the government and bear no similarity to a general adjudication which, in one suit, establishes the rights of all parties *inter sese*. *Dugan* v. *Rank*, 372 U.S. 609; *State* v. *Rank*, 293 F.2d 340 (C.A. 9); *Miller* v. *Jennings*, 243 F.2d 157 (C.A. 5).

See legislative history set forth in our *Eagle County* brief at pp. 12-15.

The new statute contemplates monthly proceedings before a water referee on water right applications. These proceedings do not constitute general adjudications of water rights because all the water users and all water rights on a stream system are not involved in the referee's determinations. The notice of the proceeding is directed only to those parties who may be "interested" in the water applications. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. The only parties before the referee are those who have taken affirmative action to file for a water right or have determined that they "desire" to file a statement in opposition, and even those who have elected to participate are not accorded a hearing on the numerous factual issues these cases necessarily involve. In addition, the Colorado statute, which makes all surface water rights confirmed under the current procedure junior to those awarded in previous district adjudications, necessarily excludes those previously decreed water rights from the consideration of the referee. As a result, the only rights before the referee are those which have arisen since the last water proceeding.

The referee's proceeding is thus extremely limited. It is administrative rather than judicial, and involves only a small part of the water rights and parties in the entire water division. Such a proceeding does not constitute a "general adjudication" as intended by Congress in 43 U.S.C. 666. See *Dugan* v. *Rank*,

supra, and *Miller* v. *Jennings*, *supra*. And see the discussion in our *Eagle County* brief, pp. 24-30.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1970.

APPENDIX A

IN THE DISTRICT COURT IN AND FOR
WATER DIVISION NO. 5
STATE OF COLORADO

To: ALL PERSONS INTERESTED IN WATER APPLICATIONS IN SAID WATER DIVISION NO. 5

Pursuant to C.R.S. 148-21-18, you are notified that the following is a resume of all applications filed in the office of the water clerk during the month of December, 1969.

The names and addresses of applicants, description of water right or conditional water right involved, and description of ruling sought, are as follows:

* * * *

APPENDIX B

IN THE DISTRICT COURT IN AND FOR
WATER DIVISION NO. 5
STATE OF COLORADO

Case No. Misc. # 1

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS, CHANGES FOR WATER RIGHTS, ETC., FILED IN SAID COURT FOR THE MONTHS OF DECEMBER, 1969, AND JANUARY, 1970

ORDER

* * * *

This matter came on for hearing and argument before the Court on the 9th day of April, 1970, upon the motion of the United States to quash service. Appearances were as noted on the title and venue page of this Order.

At the conclusion of the hearing, the matter was submitted for consideration and ruling by the Court.

The grounds of the Government's motion are two:

(1) The proceedings based on said applications do not constitute the kind of water rights adjudication suit with respect to which the United States has consented to be sued.

(2) The purported "service" of the resume does not constitute "service of process" within the meaning and contemplation of 43 U.S.C. Sec. 666 [McCarran amendment].

I

The first ground of the motion has been ruled upon adversely to the Government by the Colorado Supreme Court in an original proceeding. See: The

United States of America v. District Court of Eagle County (The Colorado River Water Conservation District, City and County of Denver, Central Colorado Water Conservancy District, and the New Jersey Zinc Company, Intervenors), —— Colo. —— (1969), 458 P. 2d 760.

Certiorari has been issued by the Supreme Court of the United States to the Colorado Supreme Court in that case for a review of its order discharging the rule to show cause why a writ of prohibition should not be issued to the trial court which had ruled that the United States was amenable to its jurisdiction in a supplemental general water adjudication being conducted under the Water Act which has since been superseded (except as to pending proceedings thereunder), by a new and different law known as the Water Rights Determination and Administration Act of 1969, under which these instant proceedings are pending.

The prohibition proceeding in the Colorado Supreme Court was heard and ruled upon under the earlier water law (C.R.S. 1963, 148-9-7).

In our opinion, the *ratio decidendi* of the Colorado Supreme Court is equally applicable to proceedings for which provision is made by the 1969 Act as concerns the Government's contention stated in sub-division (1) of the motion to quash. Perhaps to greater degree, because the jurisdiction of the Court for Water Division No. 5 extends to a much larger area than the former water district which is involved in the case on certiorari and which is now included within Water Division No. 5.

II

The second ground of the Government's motion states that the 1969 Act is inadequate in that service of the resume does not meet the requirements of

"service" within the meaning of the McCarran amendment. 43 U.S.C. Section 666 provides in pertinent part:

> (b) Service of Summons. *Summons or other process* shall be served upon the Attorney General or his designated representative (Emphasis supplied).

Rule 4(d)(4) of Federal Rules of Civil Procedure provides:

> (b) . . . When, under Rule 4(e) . . . service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule. . . .

A resume is a notice. Service of the resume is a procedural matter. Everyone (including the United States) receives the kind and length of notice to which he is entitled when served in conformity with state, and when applicable, federal statutes.

III

It might be said that there should be a present suspension of a ruling by this Court upon the motion to quash, inasmuch as the disposition of the original proceeding in the Colorado Supreme Court has been challenged in the highest Court in the land.

We are bound by and must follow, however, the rule of decision as enunciated by the highest Court of this state, while also being bound by the Supremacy Clause of the United States Constitution.[1] When we

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[1] Article VI.

* * * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made,

consider the waiver of immunity created in 43 U.S.C. 666, we do not find in the matter before this Court any conflict with the Supremacy Clause of the Constitution of the United States.

We shall treat the Colorado Water Rights and Determination Act of 1969, as a matter of local concern in which federal sovereign immunity has no place, unless and until the higher Courts of Colorado, or the federal jurisdiction, shall hold otherwise.

For the reasons stated, we must overrule the motion to quash.

It is so ordered.

The Court will entertain, where appropriate, applications by the United States for reasonable extensions of time.

Done at Chambers in the City of Glenwood Springs, Colorado, this 21st day of April, 1970.

CLIFFORD H. DARROW
Water Judge,
Water Division No. 5,
State of Colorado.

Exceptions are preserved of record.

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or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF COLORADO

24821

THE UNITED STATES OF AMERICA

vs.

THE DISTRICT COURT IN AND FOR WATER DIVISION NO. 5, STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE CLIFFORD H. DARROW, AND THE WATER REFEREE THEREOF

Application for Writ in the Nature of Prohibition

ORIGINAL PROCEEDING

Upon consideration of the application of the United States of America for writ in the nature of prohibition, together with the pleadings filed, it is this day ordered that said application be, and hereby is, denied.

BY THE COURT, EN BANC, July 9, 1970.

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